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**The Supreme Court of the
United States**

OCTOBER, 1982 term

**FRESH POND SHOPPING CENTER, INC.,
plaintiff—appellant**

v.

**ACHESON CALLAHAN, et al., as members of the
CAMBRIDGE RENT CONTROL BOARD,
defendants—appellees**

**On Appeal From a Judgment of the Supreme Judicial
Court of Massachusetts**

JURISDICTIONAL STATEMENT

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ATTORNEY FOR APPELLANT**

QUESTIONS PRESENTED

Where a Massachusetts statute regulating rents and evictions in the City of Cambridge, Massachusetts, restricts an owner's right to evict a tenant from residential rental property, but appears to preserve the owner's right to recover possession if the owner seeks to remove the property from a rental housing use; and where the same statute also authorizes Cambridge to enact an ordinance that prohibits owners of residential rental property from removing such property from rental housing use, thereby also eliminating the right to recover possession to effect such a removal:

- a. Does the ordinance cause an unconstitutional taking of the land owner's property, without just compensation, and without due process of law, where the combined effect of the statute and the ordinance upon an owner such as Appellant, is that it may therefore not evict an existing residential tenant from occupancy of its property, and consequently it may neither remove the property from a rental housing use nor use the property itself, but rather must continue to dedicate the property to the use of the existing tenant?
- b. Is the statute unconstitutional insofar as it authorizes the City of Cambridge to enact such an ordinance, which deprived Appellant of the right to exclude a tenant from its property and which permitted a local regulatory board, rather than Appellant, to determine who will have the right to use and occupy Appellant's property?

PARTIES

Appellant is Fresh Pond Shopping Center, Inc., a Massachusetts corporation. Appellees are Acheson Callahan, Fred Cohn, Judith Fellows, Tighe McSweeney, and Victoria Judson, as they are members of the Cambridge Rent Control Board. Under Massachusetts procedure, Appellees may be sued in their official capacities, as members of the Board. When this action was first filed in the Massachusetts courts, there was an additional party, David Salk, a tenant in Appellant's building. Mr. Salk was dismissed as a party, by agreement of all parties, before responsive pleadings were filed.

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STATEMENT OF JURISDICTION

Appellant, Fresh Pond Shopping Center, Inc. [henceforth denoted as "Fresh Pond"] appeals from a judgment of the Supreme Judicial Court of Massachusetts, which affirmed without opinion (by an equally divided court) a decision of the Superior Court Department of the Massachusetts Trial Court, rejecting Fresh Pond's challenge on federal constitutional grounds to the validity of a governmental enactment restricting the removal of rental units from the housing market in the City of Cambridge, Massachusetts.

The Supreme Judicial Court issued its judgment and order on March 3, 1983; a petition for rehearing was denied on March 30, 1983. Fresh Pond filed a notice of appeal in the Supreme Judicial Court on June 27, 1983. This Court's jurisdiction is conferred by 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, Section 1:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES AND ORDINANCES

Massachusetts Acts of 1976, Chapter 36

(text set forth in appendix)

City of Cambridge Ordinance 926

(text set forth in appendix)

STATEMENT OF THE CASE

On March 31, 1976 the Commonwealth of Massachusetts enacted Chapter 36 of the Acts of 1976, "An Act Enabling the City of Cambridge to Continue to Control Rents and Evictions." The full text of that act (henceforth sometimes denoted as the "Rent Control Statute") is set forth in the appendix. The object of that statute was to extend, indefinitely, Cambridge's power to impose rent and eviction controls on residential property owners, such controls having been first imposed in Cambridge, on a temporary emergency basis, approximately six years earlier (chapter 842 of the Acts of 1970).

The salient features of the Rent Control Statute, for purposes of this case, are as follows. First, all residential rental property in Cambridge, with certain exceptions, is subject to the statute and hence is considered "rent controlled." Second, a local board, called the Cambridge Rent Control Board (of which Appellees are the members) is to administer the statute and, among other things, is given the authority to set maximum rent levels for all rent-controlled housing units. Third, owners of rent-controlled property are prohibited from evicting any tenant without first securing, from the Rent Control Board, a "certificate of eviction." As a general rule, the statute requires the Board to issue certificates of eviction only where the tenant has committed a specified improper act, such as permitting unapproved subtenants or failing to pay rent. The statute also preserves the landlord's right to obtain a certificate of eviction if the landlord seeks to recover possession of the property for occupancy by himself or by a designated family member, or if the landlord seeks to remove the property from housing use by demolition or otherwise. (See Section 9(a)(9) of the statute.) Finally, the statute (Section 5(c)) authorizes the City of Cambridge to adopt "such ordinances as may be necessary to carry out the purposes of this act."

In 1979, the City of Cambridge, acting pursuant to authority which the Massachusetts Courts have held was conferred by Section 5(c) of the Rent Control Statute,* enacted an ordinance entitled Ordinance 926. The purpose of Ordinance 926 was to preserve the supply

**Flynn v. Cambridge*, 418 N.E. 2d 535 (Mass. 1981).

of rent controlled housing in Cambridge; and it accomplished that purpose by eliminating the right, previously afforded to a property owner, to cease being a landlord by removing its property from the housing market. Under Ordinance 926, an owner who seeks to remove property from housing use, and to evict a tenant in order to effect such removal, must first obtain a "removal permit" from the Rent Control Board; and if the Board should choose to deny the permit, Ordinance 926 prohibits the removal and requires the landlord to maintain the property as rental housing.

Ordinance 926 became effective immediately upon its enactment on August 13, 1979. Two days later, Fresh Pond purchased property situated on Roseland Street in Cambridge, upon which was located a six unit apartment building subject to rent control. The Roseland Street property was adjacent to a much larger piece of property already owned by Fresh Pond, which Fresh Pond leased to Sears, Roebuck & Co. for use as a retail store and parking lot.

The reason that Fresh Pond bought the Roseland Street property was that part of the larger parcel that was leased to Sears had recently been taken by eminent domain, thereby reducing the size of the Sears parking lot by approximately fifty (50) parking spaces. In order to replace those spaces, pursuant to its lease commitment, Fresh Pond purchased the adjacent Roseland Street property with the intention of demolishing the building and paving over the entire parcel. Although the purchase and sale agreement for the Roseland Street property was executed in June, 1979, before the enactment of Ordinance 926, the actual sale did not occur until August 15, two days after Ordinance 926 was enacted.

Fresh Pond had not previously been in the business of owning residential real estate. In October, 1979, about two months after it purchased the Roseland Street property, it applied to the Cambridge Rent Control Board for removal permits under Ordinance 926 to vacate the building and to demolish it in accordance with its original purpose. At that time, five (5) of the six apartment units were vacant; one was occupied by a tenant.

Exercising the discretion conferred by Ordinance 926, the Rent Control Board denied permits for each of the six units, both occupied

and unoccupied. Fresh Pond appealed by filing a complaint in the appropriate District Court Department of the Massachusetts Trial Court on April 25, 1980, asserting that the Rent Control Board's action was arbitrary and unconstitutional as applied to this case, because the effect of the Board's action was to compel Fresh Pond to maintain its property as rental housing, for the benefit of the existing tenant, and to the exclusion of Fresh Pond itself. The District Court judge found for Fresh Pond, but the Rent Control Board appealed to the Superior Court Department, which reversed and found against Fresh Pond. The Superior Court justice disposed of Fresh Pond's constitutional arguments as follows: "Plaintiff [Fresh Pond] argues that the ordinance, as applied to its case, is unconstitutional for several reasons. Meritorious or not, its contention appears to be foreclosed by the decision in *Flynn v. Cambridge*"*

Fresh Pond appealed the Superior Court's decision, and the appeal was argued before the Massachusetts Supreme Judicial Court on October 4, 1982. On March 3, 1983, the Supreme Judicial Court issued the following order:

"The judgment of the Superior Court is affirmed by an equally divided court.

Justice Wilkins took no part in the decision of the case. He is a member of the Board of Overseers of Harvard College which may have an interest in the disposition of issues raised in this case."

Fresh Pond sought a rehearing on March 14, 1983, which was denied on March 30.

STATEMENT OF REASONS NECESSITATING PLENARY CONSIDERATION

Plenary consideration of this appeal is necessary because the effect of the Rent Control Statute, authorizing Cambridge to enact an ordinance which requires Fresh Pond to devote its property to rental housing use, and excluding Fresh Pond from possession of its own

**Flynn v. Cambridge*, 418 N.E. 2d 335 (Mass. 1981), was decided by Massachusetts Supreme Judicial Court in March, 1981, and held that Ordinance 926 was properly enacted by Cambridge pursuant to the authority implied in the Rent Control Statute, chapter 36 of the Acts of 1976. The Court in *Flynn, supra*, rejected arguments that Ordinance 926 effected an unconstitutional taking of property without just compensation, relying for that result upon the balancing test then recently articulated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

property, in favor of the existing tenant, constitutes a taking of Fresh Pond's property without compensation and without due process of law, in violation of the Fourteenth Amendment of the United States Constitution.

The extent of the taking of Fresh Pond's property becomes evident from examination of the ordinance and the statute. The purpose of the ordinance is to preserve the supply of rent-controlled units in Cambridge, *Flynn v. Cambridge*, 418 N.E. 2d 335 (Mass. 1981). To effect that purpose, the ordinance provides that no rent-controlled unit may be "removed" from the market without a removal permit. "Removal from the market" is not precisely defined in the ordinance, but is stated to include, "but . . . not [be] limited to" such things as demolition of the unit.

To determine whether the Rent Control Board should grant a removal permit, the ordinance sets forth no specific standards, but instead lists three factors which the Board is required to "consider" in evaluating a proposed removal: (1) benefit to the tenants protected by the statute; (2) hardship imposed upon existing tenants of the unit sought to be removed; and (3) aggravation of Cambridge's housing shortage. As is evident, none of the three foregoing factors relates in any way to the owner's right to use and occupy property, and indeed the factors are designed in such a way as to allow the Board to justify denial of a removal permit in virtually any case, as was done here. Consequently, the ordinance sharply limits the Rent Control Board's ability to grant removal permits, but gives it essentially unlimited discretion to deny them.

Once the Rent Control Board denies a removal permit, the provision of the Rent Control Statute, and the interaction between the statute and the ordinance, completely frustrate any attempt by an owner to remove property from a rental housing use, or to evict an existing tenant. While the statute, on its face, appears to preserve the owner's right to evict a tenant if the owner seeks to remove the property from a rental housing use, since such removal is one of the grounds for obtaining a certificate of eviction (see Section 9(a)(9) of the statute), the reality is exactly the opposite. Once the Rent Control Board has denied a removal permit, the owner can no longer remove its property from rental housing use, and accordingly cannot obtain a certificate of eviction to evict the tenant. In sum, while the statute on its face would appear to prohibit the Rent Control Board from interfering with an owner's right to evict a tenant in order to remove

the property from rental housing use, the ordinance enacted pursuant to the same statute effectively repealed that prohibition and hence eliminated the landlord's right to remove property from rental housing use. The Massachusetts courts in this case and in *Flynn v. Cambridge*, *supra*, 418 N.E. 2d 335 (Mass. 1981), have upheld this result as a matter of state law.

Accordingly, the combined effect of the statute and the ordinance is that the Rent Control Board is able to prohibit, and has prohibited, Fresh Pond from ever recovering possession of its property from the existing tenant. Fresh Pond's property must therefore remain, by governmental order, dedicated indefinitely to rental housing, occupied by someone other than Fresh Pond. The Rent Control Board, rather than Fresh Pond, now has the right to determine who will occupy Fresh Pond's property, and Fresh Pond has no control over its use or occupancy.

The deprivation of Fresh Pond's property which results from its being compelled to rent to the existing tenant closely resembles the state-ordered occupation of the landlord's property which was before the Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, ___ U.S. ___ (1982); 73 L. Ed 2d 868; 102 S. Ct. 3164 (June 30, 1982). In that case, the Court held that governmental enactment that authorizes "a permanent physical occupation [of property by other than the owner] . . . is a taking without regard to the public interests that it may serve," 73 L. Ed 2d, at 876.

As in *Loretto, supra*, the Rent Control Statute and the removal permit ordinance effect a permanent physical occupation of Fresh Pond's property by requiring Fresh Pond to permit the tenant to remain in the property for so long as the tenant desires. While the tenant is of course free to vacate the property at any time, that fact does not preclude the occupancy from being considered "permanent," for the tenant cannot be compelled to leave unless he violates some statutory requirement. Moreover, the analogous situation in *Loretto, supra*, was that the cable television company was equally free to remove its cables at any time; its occupancy was nevertheless considered to be permanent.

Nor does the occupancy of Fresh Pond's property become any less permanent because the ordinance might at some point cease to be effective. Once again, *Loretto* is analogous because it was always open to New York to repeal its statute; that fact did not prevent the *Loretto* occupation from being considered to be "permanent." Fur-

thermore, while it is true that the Cambridge ordinance contains a provision for termination upon the occurrence of either of two events, the termination is illusory, for there is no basis to infer that either event will happen in the foreseeable future. The two events are, first, an increase in the total number of rent-controlled units to a level exceeding the level existing as of January 1, 1970, and second, an increase in the vacancy rate for rent-controlled units to exceed four percent. The first of those two events is virtually impossible; the ordinance itself declares that the supply of housing stock has decreased by over 10 percent since 1970, and under the Rent Control Statute, any new construction or conversion to housing use after that time would not be subject to rent control (Rent Control Statute, Section 2(b)(2)). The same holds true for the second event, an increase in the vacancy rate. Because the supply of controlled units is decreasing, not increasing, the vacancy rates are similarly likely to decrease rather than increase. Compounding this factor is the fact that the purpose of rent control is to keep rents artificially low, below market rates, which makes the rent-controlled units particularly attractive to tenants and further reduces the vacancy rate. Accordingly, because the ordinance recited that the vacancy rate was below one percent when it was enacted, and because the foregoing factors make it highly unlikely that the rate will increase four-fold to the four percent level needed to suspend the effectiveness of the ordinance, the ordinance cannot be considered a mere temporary measure, but must be considered as permanent as the cable regulation in *Loretto*.

Indeed, the deprivation of Fresh Pond's property is much more extensive than the occupation in *Loretto*, for Fresh Pond is precluded from removing *any* of its property from the market, as the term "removal" is used in the ordinance. While the ordinance does permit Fresh Pond to leave vacant those units that are presently vacant, Fresh Pond does not have even that option with respect to the unit from which the tenant has refused to move, since it cannot compel the tenant to leave. Moreover, even as to the vacant units, Fresh Pond may not occupy that space itself, nor may it permanently remove those units from the market by demolition or conversion to a non-housing use; if those vacant units are to be occupied, Cambridge mandates that it must be by someone other than Fresh Pond.

It is the elimination of the owner's right to determine who will occupy its property, combined with the permanent deprivation of

the owner's right to remove its property from a rental housing use, that distinguishes this case, and this statute, from the more typical rent control schemes which have long been held valid. *E.g. Block v. Hirsh*, 256 U.S. 135 (1921). Compare, for example, *Bowles v. Willingham*, 321 U.S. 503 (1944), where the Court upheld the rent control provision of the Emergency Price Control Act of 1942; that statute contained no such bar to eviction and demolition and in fact contained the express provision that "nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent," 321 U.S. at 517. *Accord, Wilson v. Brown*, 137 F. 2d 348 (Em. Ct. App. 1943); *see also, Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922).

In contrast to the foregoing cases, the eviction regulation in this case more closely resembles the Puerto Rican statute struck down by the First Circuit Court of Appeals in *Rivera v. Cabian Chinea & Co.*, 181 F. 2d 974 (1st Cir. 1950). Puerto Rico had enacted "emergency" legislation in 1946 to control rents. Included in that legislation was a provision, similar to the one at issue in this case, which prohibited a property owner from evicting a tenant, so long as the tenant was paying the mandated rent, even where the owner sought possession of the property in order to remove it from rental housing use. In holding the legislation unconstitutional, the Court stated:

[T]he effect of [the statute] is to compel such a landlord to dedicate his property indefinitely to the rental market and to prevent him, except with the consent of his tenant, from having the use of it himself. For the Legislature to compel the plaintiff against his will to keep his property in the rental market and to prevent him from using it in his own personal business for the duration of the emergency would appear to be a "taking" of the property for which just compensation has not been provided. It is significant to observe that in order to avoid these very objections the Congress of the United States in enacting the Emergency Price Control Act of 1942 provided in Section 4(d) that "Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent."¹¹ Likewise similar provision was made in the Housing and Rent Act of 1947, as amended by the Acts of 1948 and 1949.¹²

We hold, therefore, that Section 12 of the Reasonable Rents Act of 1946 violates the Fifth Amendment to the Constitution

and Section 2 of the Organic Act to the extent that it prohibits a landlord from prosecuting an action of unlawful detainer against a tenant the term of whose lease contract has expired when the landlord desires in good faith to recover the leased premises for the purpose of withdrawing them from the rental market and devoting them to his own use. 181 F. 2d, at 978.

For the same reasons, the ordinance in this case, and the statute that authorized it, effect a similar "taking" of property for which no compensation has been provided. Indeed, the taking in the present case is even more extreme than in *Rivera, supra*; for in that case the owner could at least occupy or remove the property from a housing use once the tenant voluntarily vacated. In this case, in contrast, not only has Cambridge prohibited Fresh Pond from evicting the tenant, it has forbidden removal of even the vacant units from the housing market, so that even if the tenant were to vacate voluntarily, Fresh Pond would still be denied the use of its own property. As the statute provides no compensation for this serious restriction of Fresh Pond's ownership rights, there has been an unconstitutional taking.

Respectfully submitted,

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APPENDIX

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.	SUPERIOR COURT
	CIVIL ACTION
	NO. 81-1179
)
FRESH POND SHOPPING)
CENTER, INC..)
	Plaintiff) MEMORANDUM AND
v.) ORDER ON CROSS-
ACHESON CALLAHAN,) MOTIONS FOR SUMMARY
JERALD BILLOWS, FRED) JUDGMENT
COHN, JUDITH FELLOWS,)
and TIGHE McSWEENEY, As)
they are Members of the Cam-)
bridge Rent Control Board,)
	Defendants)
)

Most the facts are not in dispute and the parties are in agreement that the case should be disposed of on these cross-motions.

Plaintiff owns property in Cambridge with six rental units, one of which is presently occupied. Plaintiff purchased the building with the intention of demolishing it. Plaintiff, pursuant to Cambridge Ordinance 926, applied to the Cambridge Rent Control Board for a permit to remove the property from the rental market, but the permit was denied after a hearing. The District Court decided on a Motion for Judgment on the Pleadings or Summary Judgment that Ordinance 926 did not apply to the transaction because the agreement for purchase and sale of the property was signed by plaintiff prior to enactment of the ordinance. The case is in Superior Court on appeal from that decision of the District Court. After the decision was rendered in the District Court, the Supreme Judicial Court handed down its decision upholding the Cambridge ordinance against a facial attack in the case of *Flynn v. Cambridge, Mass. Adv. Sh.* (1981) 692.

Plaintiff argues that the ordinance, as applied to its case, is unconstitutional for several reasons. Meritorious or not, its contention

appears to be foreclosed by the decision in *Flynn v. Cambridge*, *supra*. Removal for demolition presents at least as strong a case for concern about the emergency in the rental housing market as does condominium conversion. The possible inconsistency between the ordinance and the provisions of Section 9 of Chapter 36 of the Acts of 1976 was dealt with in the *Flynn* case. (See fn. 5 on p. 697.)

Reviewing the administrative record, there appears to be substantial evidence in it to support the Board's findings and no abuse of discretion or error of law.

Accordingly, defendant's Motion for Summary Judgment is ALLOWED.

Edith W. Fine
Justice of the Superior Court

Dated: June 26, 1981
&
Entered

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

NO. 2813

FRESH POND SHOPPING CENTER, INC.
vs.
RENT CONTROL BOARD OF CAMBRIDGE

ORDER

The judgment of the Superior Court is affirmed by an equally divided court.

Justice Wilkins took no part in the decision of the case. He is a member of the Board of Overseers of Harvard College which may have an interest in the disposition of issues raised in this case.

By the Court

Patrick J. Hurley
Clerk

March 3, 1983

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH
Room 1412

Court House

Boston, Massachusetts 02108
(617) 725-8055

PATRICK J. HURLEY
Clerk

FREDERICK J. QUINLAN
Assistant Clerk

March 30, 1983

M. Robert Dushman, Esq.
Brown, Rudnick, Freed & Gesmer
1 Federal Street
Boston, MA 02110

Dear Mr. Dushman: Re: Fresh Pond Shopping Center, Inc. vs. Rent
Control Board of Cambridge *Supreme Judicial
Court No. SJC-2813*

Your Petition for Rehearing has been considered by the court and
is denied.

Very truly yours,

Patrick J. Hurley
Clerk

c.c.: Stephen B. Deutsch, Esq.
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COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

NO. SJC-2813

FRESH POND SHOPPING CENTER, INC.)
) Plaintiff-Appellant
v.)
)
ACHESON CALLAHAN, ET AL, Members of the Cambridge)
Rent Control Board,)
) Defendants-Appellees
)

NOTICE OF APPEAL

The appellant, Fresh Pond Shopping Center, Inc., hereby appeals to the United States Supreme Court, pursuant to 28 U.S.C. sections 2101 and 2104, from the judgment and order entered by the Supreme Judicial Court on March 3, 1983, and the final judgment entered after rescript in the Superior Court on April 1, 1983.

M. Robert Dushman
Brown, Rudnick, Freed & Gesmer
One Federal Street
Boston, MA 02110

Filed: June 27, 1983

CERTIFICATE OF SERVICE

I, M. Robert Dushman, hereby certify that on this 27th day of June, 1983, I served the attached *Notice of Appeal* on the defendants-appellees by causing a copy thereof to be delivered by hand to their attorney, Stephen B. Deutsch, Esquire, Foley, Hoag & Eliot, One Post Office Square, Boston, Massachusetts, 02109.

M. Robert Dushman

Acts, 1976. — Chap. 36

Chap. 36. AN ACT ENABLING THE CITY OF CAMBRIDGE TO CONTINUE TO CONTROL RENTS AND EVICTIONS.

Whereas, the City of Cambridge now desires and intends to continue its rent and eviction control program beyond the expiration of Chapter eight hundred forty-two of the Acts of 1970, as amended; and

Whereas, the deferred operation of this act would tend to defeat its purpose which is, in part, to alleviate certain effects of the severe shortage of rental housing in the City of Cambridge, which shortage has caused a serious emergency detrimental to the public peace, health, safety and convenience, therefore this act is hereby declared to be an emergency law, necessary for the immediate preservation of the public peace, health, safety and convenience.

Be it enacted, etc., as follows:

SECTION 1. Declaration of Emergency. The general court finds and declares that a serious public emergency exists with respect to the housing of a substantial number of the citizens in the City of Cambridge, which emergency has been created by housing demolition, deterioration of a substantial portion of the existing housing stock, insufficient new housing construction, increased costs of construction and finance, inflation, influx of young people and the desirability of Cambridge as a place to live, and which has resulted in a substantial and increasing shortage of decent rental housing accommodations especially for families of low and moderate income and for elderly people on fixed income and abnormally high rents; that unless residential rents and eviction of tenants are regulated and controlled, such emergency and the further inflationary pressures resulting therefrom will produce serious threats to the public health, safety and general welfare of the citizens of Cambridge and in other adjacent communities; that such emergency should be met by the Commonwealth immediately and with due regard for the rights and responsibilities of the City of Cambridge.

SECTION 2. Effective Date, Revocation, and Reacceptance. This act shall take effect in the City of Cambridge upon its passage and such passage shall be deemed to constitute the initial acceptance of this act by the City of Cambridge. Once this act has been accepted, it may be repealed or revoked, or otherwise nullified by a majority vote of the Cambridge City Council or on a ballot measure submitted to the registered voters of the City of Cambridge in accordance with the procedures of Sections 37

through 40 of Chapter forty-three of the General Laws. If this act is repealed or revoked, or otherwise nullified, the provisions of this act shall be treated as still remaining in force for the purpose of sustaining any proper suit, action or prosecution with respect to any right, liability or offense arising under the provisions of this act. If repealed or revoked, or otherwise nullified, it may be reaccepted in one of the following ways:

1) by a majority vote of the members of the Cambridge City Council, or

2) by initiative petition and vote pursuant to the procedures of Sections 37 through 40 of Chapter 43 of the General Laws.

SECTION 3. Definitions. The following words or phrases as used in this act shall have the following meanings:

a) "Rental units", any building, structure, or part thereof, or land appurtenant thereto, or any other real or personal property rented or offered for rent for living or dwelling purposes, including houses, apartments, rooming or boardinghouse units, and other properties used for living or dwelling purposes, together with all services connected with the use or occupancy of such property.

b) "Controlled rental units", all rental units except:

1) rental units in hotels, motels, inns, tourist homes and rooming or boarding houses which are rented primarily to transient guests for a period of less than fourteen consecutive days;

2) rental units the construction of which was completed on or after January one, nineteen hundred and sixty-nine, or which are housing units created by conversion from a nonhousing to a housing use on or after said date;

3) rental units which a governmental unit, agency, or authority either:

i) owns or operates; or

ii) regulates the rents, other than units regulated

a) under the provisions of this act, or

b) under the provisions of any other general or special law authorizing municipal control of rental levels for all or certain rental units within a municipality; or

iii) finances or subsidizes, if the imposition or rent control would result in the cancellation or withdrawal, by law, of such financing or subsidy;

4) rental units in cooperatives;

5) rental units in any hospital, convent, monastery, asylum, public institution or college or school dormitory operated exclusively for charitable or educational purposes; or nursing home or rest home or charitable home for the aged, not organized or operated for profit;

6) the rental unit or units in an owner-occupied two-family or three-family house;

7) that the City of Cambridge may exempt those rental units for which the rent charges exceed limits specified by said municipality; provided that in no event shall more than twenty-five percent of the total rental units in Cambridge be exempted under this subsection.

c) "Rent", the consideration including any bonus, benefits, or gratuity demanded or received for or in connection with the use or occupancy of rental units or the transfer of a lease of such rental units.

d) "Services", repairs, replacement, maintenance, painting, providing light, heat, hot and cold water, elevator service, window shades and screens, storage, kitchen, bath and laundry facilities and privileges, janitor services, refuses removal, furnishings, and any other benefit, privilege or facility connected with the use or occupancy of any rental unit. Services to a rental unit shall include a proportionate part of services provided to common facilities of the building in which the rental unit is contained.

SECTION 4. Transition.

a) The Board shall assume possession of all records, documents and other materials in possession of the board established and operated under Chapter 842 of the Acts of 1970 or any special or general laws regulating rents and evictions enacted subsequent to Chapter 842 of the Acts of 1970.

b) Any proceeding commenced by the board established under said Chapter 842, or orders related thereto and any rules and regulations of said board shall remain in effect for the purposes of this act unless otherwise ordered by the board.

c) the board shall have authority to issue regulations and orders necessary and helpful for the efficient transition from the administration of said Chapter 842, or any special or general laws regulating rents and evictions enacted subsequent to said Chapter 842, to the administration of this act.

SECTION 5. Rent Board.

a) This act shall be administered by a rent control board. Immediately upon the acceptance of this act the rent board established under Chapter 842 of the Acts of 1970 shall be deemed to be the rent board appointed by the city manager under this act to serve at the pleasure of the city manager or the city manager may appoint a new rent control board to serve at the pleasure of the city manager.

b) Members of the rent board shall receive no compensation for their services, but shall be reimbursed by the city for necessary expenses incurred in the performance of their duties.

c) The rent control board, hereinafter called the board, shall be responsible for carrying out the provisions of this act, and shall hire, with the approval of the city manager, such personnel, not subject to the provisions of section nine A of chapter thirty of the general laws or chapter thirty-one of the general laws, as are needed, shall promulgate such policies, rules and regulations as will further the provisions of this act, and shall recommend to the city, for adoption, such ordinances as may be necessary to carry out the purposes of this act.

d) The board may make such studies and investigations, conduct such hearings, and obtain such information as is deemed necessary in promulgating any regulation, rule or order under this act, or in administering and enforcing this act and regulations and orders promulgated hereunder. For the foregoing purposes, a person may be summoned to attend and testify and to produce books and papers in like manner as he may be summoned to attend as a witness before a court. Any person who rents or offers for rent or acts as broker or agent for the rental of any controlled rental unit may be required to furnish under oath any information required by the board and to produce records and other documents and make reports. Such persons shall have the right to be represented by counsel, and a transcript shall be taken of all testimony and such person shall have the right to examine said transcript at reasonable times and places. Section ten of chapter two hundred and thirty-three of the General Laws shall apply, and for the purposes of this act a justice of the district court shall have the same power as a justice of the Supreme Judicial or Superior Court to implement the provisions of said section.

e) the board shall have the power to issue orders and promulgate regulations to effectuate the purposes of this act.

SECTION 6. *Maximum Rent.*

a) the maximum rent of a controlled rental unit shall be the maximum rent most recently established under Chapter 842 of the Acts of 1970 and regulations thereunder, immediately prior to the initial acceptance of this act, for all units which were then subject to said Chapter 842. For any rental units controlled under this act which were not then subject to said Chapter 842 the maximum rent shall be the rent lawfully charged the occupant of such unit for the month six months prior to the date on which the unit became controlled. If the rental unit was unoccupied at that time but was occupied at any time prior to that date, the maximum rent shall be the rent lawfully charged therefor for the month closest to one month prior to the date on which the unit became controlled. Upon the reacceptance of this act the maximum rent of a controlled unit shall be the rent lawfully charged the occupant of such unit for the month 6 months prior to the reacceptance of this

act unless the rent for the unit was established by the rent board within said six month period, in which case the rent shall be the rent so established by the rent board. If the rental unit was unoccupied at that time but was occupied at any time prior to the reacceptance of this act, the maximum rent shall be the rent lawfully charged therefor for the month closest to six months prior to the reacceptance of this act. If the maximum rent is not otherwise established, it shall be established by the board. Any maximum rent may be subsequently adjusted under the provisions of section seven.

b) The board shall require registration of all controlled rental units in Cambridge on forms authorized or to be provided by said board. The registration forms for units controlled under the provision of Chapter 842 of the Acts of 1970, as the same have been amended from time to time, shall be deemed the initial registration forms filed pursuant to this act, except where the board finds any or all of such forms inadequate.

SECTION 7. Maximum Rent Adjustment.

a) The board shall make such individual or general adjustments, either upward or downward, of the maximum rent established by section six for any controlled rental unit or any class of controlled rental units as may be necessary to assure that rents for controlled rental units are established at levels which yield to land lords a fair net operating income for such units. For the purposes of this section, the word "class" shall include all the controlled rental units within Cambridge or any categories of such rental units based on size, age, construction, rent, geographic area or other common characteristics, providing the board has by regulation defined any such categories.

b) The following factors, among other relevant factors, which the board by regulation may define, shall be considered in determining whether a controlled rental unit yields a fair net operating income:

1. increases or decreases in property taxes;
2. unavoidable increases or any decreases in operating and maintenance expenses;
3. capital improvement of the housing unit as distinguished from ordinary repair, replacement and maintenance;
4. increases or decreases in living space, services, furniture, furnishings or equipment.
5. substantial deterioration of the housing units other than as a result of ordinary wear and tear; and
6. failure to perform ordinary repair, replacement and maintenance.

c) For the purpose of adjusting rents under the provisions of this section, the board may promulgate a schedule of standard rental increases or decreases for improvement or deterioration in specific services and facilities.

d) The board may refuse to grant a rent increase under this section, if it determines that the affected rental unit does not comply with the state sanitary code and any applicable municipal codes, ordinances or bylaws, and if it determines that such lack of compliance is due to the failure of the landlord to provide normal and adequate repair and maintenance. The board may refuse to grant a rent decrease under this section, if it determines that a tenant is more than sixty days in arrears in payment of rent unless such arrearage is due to a withholding or rent under the provisions of Section 8A of Chapter 239, or Section 127L of Chapter 111, or Section 14 of Chapter 186 of the general laws.

e) The board may remove maximum rental levels, established under this section and section five, for any class of controlled rental units if in its judgment the need for continuing such maximum rental levels no longer exists because of sufficient construction of new rental units the rental levels for which are comparable to the rental levels of the class of controlled rental units for which maximum rental levels are to be discontinued or because the demand for rental units has been otherwise met. Any maximum rental level removed under this paragraph shall be reimposed or adjusted and reimposed upon a finding by the rent board that a substantial shortage of rental units exists in Cambridge and that the reimposition of rent control is necessary in the public interest. Any action under this paragraph shall be subject to the hearing and notice requirements of paragraph (b) of section seven.

SECTION 8. Rent Adjustment Hearings.

a) The board shall consider an adjustment of rent for an individual controlled rental unit upon receipt of a petition for adjustment filed by the landlord or tenant of such unit or upon its own initiative. The board shall notify the landlord, if the petition was filed by the tenant, or the tenant, if the petition was filed by the landlord, of the receipt of such petition and of the right of either party to request a hearing. If a hearing is requested by either party, or if the action is undertaken on the initiative of the board, the hearing shall be conducted before at least one member of the board or the board's designee prior to the decision by the board to grant or refuse a rental adjustment. Notice of the time and place of the hearing shall be furnished to the landlord and tenant. The board may consolidate petitions relating to controlled rental units in the same building, and all such petitions may be considered in a single hearing.

b) On its own initiative, the board may make a general adjustment, by percentage, of the rental levels for any class of controlled rental units within Cambridge. Prior to making such adjustment, a public hearing shall be held before at least a majority of the board. Notice that an adjustment is under consideration, a description of the class of rental units which would be affected by the adjustment, and the time and place of said public hearing shall be published three times in at least one newspaper having a general circulation within the City of Cambridge.

c) Notwithstanding any other provision of this section, the board may, without holding a hearing, refuse to adjust a rent level for an individual rental unit if a hearing has been held with regard to the rental level of such unit within twelve months.

d) Hearings required by paragraph a) shall be conducted in accordance with the provisions of section eleven of Chapter thirty A of the General Laws except that requirements (7) and (8) of said section eleven shall not apply to such hearings.

SECTION 9. *Evictions.*

a) No person shall bring any action to recover possession of a controlled rental unit unless:

1) the tenant has failed to pay the rent to which the landlord is entitled;

2) the tenant has violated an obligation or covenant of his tenancy not inconsistent with Chapter 93A of the General Laws or this act, or the regulations issued pursuant thereto, other than the obligation to surrender possession upon proper notice and has failed to cure such violation after having received written notice thereof from the landlord;

3) the tenant is committing or permitting to exist a nuisance in or is causing substantial damage to, the controlled rental unit, or is creating a substantial interference with the comfort, safety, or enjoyment of the landlord or other occupants of the same or any adjacent accommodation;

4) the tenant is convicted of using or permitting a controlled rental unit to be used for any illegal purpose;

5) the tenant, who had a written lease or rental agreement which terminated on or after this act has taken effect has refused, after written request or demand by the landlord, to execute a written extension or renewal thereof for a further term of like duration and in such terms that are not inconsistent with or violative of any provisions of Chapter 93A of the General Laws or this act, or the regulations issued pursuant thereto;

6) the tenant has refused the landlord reasonable access to the unit for the purpose of making necessary repairs or improvements required by the laws of the Commonwealth, or any political

subdivision thereof, or for the purpose of inspection as permitted or required by the lease or by law, or for the purpose of showing the rental unit to any prospective purchaser or mortgagee;

7) the person holding at the end of a lease term is a subtenant not approved by the landlord;

8) the landlord seeks to recover possession in good faith for use and occupancy of himself, or his children, parents, brother, sister, father-in-law, mother-in-law, son-in-law, or daughter-in-law;

9) the landlord seeks to recover possession to demolish or otherwise remove the unit from housing use; and

10) the landlord seeks to recover possession for any other just cause, provided that his purpose is not in conflict with the provisions and purposes of Chapter 93A of the General Laws or this act, or the regulations issued pursuant thereto. Recovery of possession in order to convert an apartment unit to a condominium unit shall not be a valid reason to recover possession of a controlled rental unit.

b) A landlord seeking to recover possession of a controlled rental unit shall apply to the board for a certificate of eviction. Upon receipt of such an application, the board shall send a copy of the application to the tenant of the controlled rental unit together with a notification of all rights and procedures available under this section. If the board finds that the facts attested to in the landlord's petition are valid and in compliance with paragraph a), the certificate of eviction shall be issued.

c) A landlord who seeks to recover possession of a controlled rental unit without obtaining such certificate of eviction shall be deemed to have violated this act, and the board may initiate a criminal prosecution for such violation.

d) Notwithstanding the provisions of this section the United States, the Commonwealth, or any agency or political subdivision thereof, may maintain an action or proceeding to recover possession of any rental unit operated by it if such action or proceeding is authorized by the Statute or regulation under which such units are administered.

e) The provisions of this section shall be construed as additional restrictions on the right to recover possession of a controlled rental unit. No provision of this section shall entitle any person to recover possession of such a unit.

SECTION 10. *Judicial Review.*

a) Any person who is aggrieved by any action, regulation or order of the board may file a complaint against the board in the Third District Court of Eastern Middlesex, and thereupon an order of notice shall be issued by said court and served on the board. Said district court shall have exclusive original jurisdiction

over such proceedings and shall be authorized to take such action with respect thereto as is provided in the case of the Superior Court under the provisions of chapter two hundred and thirty-one A of the General Laws, except that section three of said chapter two hundred and thirty-one A shall not apply. All orders, judgments and decrees of said district court may be appealed as is provided in the case of a civil action in said district court.

b) The Third District Court of Eastern Middlesex shall have exclusive original jurisdiction over actions arising out of the provisions of section eleven.

SECTION 11. *Civil Remedies.*

a) Any person who demands, accepts, receives or retains any payment of rent in excess of the maximum lawful rent, in violation of the provisions of this act or any regulation or order hereunder promulgated, shall be liable as hereinafter provided to the person from whom such payment is demanded, accepted, received, or retained, or to the city, for reasonable attorney's fees and costs as determined by the court, plus liquidated damages in the amount of one hundred dollars, or not more than three times the amount by which the payment or payments demanded, accepted, received or retained exceed the maximum rent which could be lawfully demanded, accepted, received or retained, whichever is the greater; provided that if the defendant proves that the violation was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation, the amount of such liquidated damages shall be the amount of the overcharge or overcharges.

b) If the person from whom such payment is demanded, accepted, received or retained in violation of the provisions of this act or any rule or regulation hereunder promulgated fails to bring an action under this section within thirty days from the date of the occurrence of the violation, the board may either settle the claim arising out of the violation or bring such action. Settlement by the board shall thereafter bar any other person from bringing action for the violation or violations with regard to which a settlement has been reached. If the board settles said claim, it shall be entitled to retain the costs it incurred in the settlement thereof, and the person against whom the violation was committed shall be entitled to the remainder. If the board brings action under the provisions of this section, it shall be entitled to receive attorney's fees and costs under the provisions of paragraph a) and the person against whom the violation was committed shall be awarded liquidated damages under said paragraph a).

c) A judgment for damages or on the merits in any action under this section shall be a bar to any recovery under this section in any other action against the same defendant on account of any

violation with respect to the same person prior to the institution of the action in which such judgment was rendered. Action to recover liquidated damages under the provisions of this section shall not be brought later than four years after the date of the violation. A single action for damages under the provisions of this section may include all violations of the provisions of this section committed by the same defendant against the same person.

SECTION 12. *Criminal Penalties.*

a) It shall be unlawful for any person to demand, accept, receive or retain any rent for the use or occupancy of any controlled rental unit in excess of the maximum rent prescribed therefor under the provisions of this act or any order or regulation hereunder promulgated, or otherwise to do or omit to do any action in violation of the provisions of this act or any order or regulation hereunder promulgated.

b) It shall be unlawful for any person to demand, accept, receive or retain any payment which exceeds the maximum lawful rent for one month as a finder's fee or service charge for the opportunity to examine or lease any controlled rental unit, and no finder's fee or service charge shall be lawful unless the person from whom the payment is demanded, accepted, received or retained actually rents or leases the controlled rental unit with regard to which payment of said fee or said charge has been demanded, accepted, received or retained.

c) whoever willfully violates any provision of this act or any rule or regulation hereunder promulgated, or whoever knowingly makes any false statement in any testimony before the rent board or whoever knowingly supplies the rent board with any false information shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than ninety days or both; provided, however, that in the case of a second or subsequent offense, such person shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than one year, or both.

SECTION 13. *Severability.* If any provisions of this act or the application of such provision to any person or circumstance shall be held invalid, the validity of the remainder of this act and the applicability of such provision to other persons or circumstances shall not be affected thereby.

Approved March 31, 1976.

City of Cambridge

In the Year One Thousand, Nine Hundred Seventy-nine

AN ORDINANCE

In amendment to an ordinance formerly entitled "The General Ordinances of the City of Cambridge" as revised in 1972 and now designated as "The Code of the City of Cambridge."

Be it ordained by the City Council of the City of Cambridge as follows:

That a new Chapter Twenty-Three be added at the end thereof entitled "*Chapter Twenty-Three. Regulations Pertaining to Controlled Rental Housing Units.*"

CHAPTER TWENTY-THREE. REGULATIONS PERTAINING
TO CONTROLLED RENTAL HOUSING UNITS.

Section 1. Removal of Controlled Rental Units From Market.

(a) *Declaration of emergency.* A serious public emergency continues to exist in the City of Cambridge with respect to the housing of a substantial number of its citizens, as declared by Chapter 36 of the Acts of 1976, for the reasons stated in the Act. The emergency has worsened since 1976 because of the removal of a substantial number of rental housing units from the market, by condominium conversion, demolition, and other causes. As a result, more than 2,000 or over 10 percent of the controlled rental units in the city have been removed from the housing market since 1970, and the vacancy rate has fallen below one percent. In order to carry out the purposes of the Act, and to continue to provide a sufficient supply of decent, affordable rental housing accommodations especially for families of low and moderate income and for elderly people on fixed incomes, it is necessary for the Cambridge City Council, in the exercise of its powers under section 6 of the Home Rule Amendment and under section 5(c) of the Act, to regulate the removal of controlled rental housing units from the market.

(b) Definitions. As used in this section:

- (1) "Act" means Chapter 36 of the Acts of 1976, as amended from time to time.
- (2) "Board" means the Rent Control Board established by section 5 of the Act.
- (3) "Controlled rental unit" means any unit included in the definition under section 3(b) of the Act.
- (4) "Removal from the market" as applied to a controlled rental unit, includes but is not limited to:
 - (i) occupy, as an owner of a unit which is a condominium unit, if the last previous occupant was a tenant; however, if the same person will occupy the controlled rental unit as a condominium unit owner, this ordinance will not apply.
 - (ii) demolish; or
 - (iii) rehabilitate, repair or improve, other than as required by the laws of the Commonwealth or the city, in such a way as to prevent residential occupancy during the course of the rehabilitation, repair or improvement.

But, this term "removal from the market" does not include occupancy of a non-condominium unit by the owner of the building in which it is located or by any member of his/her immediate family; or a condominium unit which the unit owner occupied before the tenant occupied it; or a condominium unit as to which unit it can be shown with respect to its initial sale after the recording of the master deed that a purchase and sale agreement has been entered into prior to August 10, 1979, a cancelled check being conclusive proof of the transaction, or a unit deed recorded in Middlesex Registry of Deeds prior to August 10, 1979.

(c) *Removal regulated.* No owner or other person shall remove from the market any controlled rental unit, unless the board after a hearing grants a permit. The board may issue orders and promulgate regulations to effectuate the purposes of this section, and to prescribe the procedure for applications, notice, hearings, and the granting and withdrawal of permits. A permit to remove from the market a unit in a building converted or proposed to be converted to a condominium may be granted to the owner of the building before the sale of the unit.

(d) *Considerations.* In deciding whether to grant a permit under this section, the board shall consider:

- (1) the benefits to the persons sought to be protected by the Act and by this section;
- (2) the hardships imposed on the tenants residing in the unit proposed to be removed, including any mitigating provisions made by the applicant; and
- (3) any aggravation of the shortage of decent rental housing accommodations, especially for families of low and moderate income and elderly people on fixed incomes, which may result from the removal.

(e) *Effectiveness.* This section shall take effect immediately, but shall cease to be effective if the board files its certificate with the city clerk that:

- (1) the vacancy rate in the total supply of controlled rental exceeds four percent, or
- (2) the total number of rental units in the city excluding public housing units, exceeds that number as of January 1, 1970.

If such a certificate ceases to be correct, the board shall withdraw it by filing a new certificate, and this section shall then again be effective until one of the above conditions again prevails.

(f) *Penalty.* Any person who violates this section shall be punished by a fine of not more than five hundred dollars. The removal of each unit shall constitute a separate violation.

(g) *Equitable relief.* The board or any person aggrieved by a failure to comply with this section may enforce its provisions in a civil action for injunctive or declaratory relief.

(h) *Severability.* The provisions of this section are severable. If a court declares invalid any such provision, or its application to any person or circumstance, the invalidity shall not affect the validity of any other provision or application.

In City Council August 13, 1979.

Passed to be ordained as amended by a yea and nay vote: Yeas 5; Nays 3; Absent 1.

James L. Sullivan, City Manager.

ATTEST: Paul E. Healy, City
Clerk

DATE: August 17, 1979
A TRUE COPY ATTEST:

Paul E. Healy

CITY CLERK

Office-Supreme Court, U.S.
FILED

No. 82-2151

AUG 15 1982

ALEXANDER L. STEVENS,
CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1982

FRESH POND SHOPPING CENTER, INC.,
APPELLANT,

v.

RENT CONTROL BOARD OF CAMBRIDGE,
APPELLEE.

On Appeal from the
Supreme Judicial Court
of Massachusetts

MOTION TO DISMISS

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I

Question Presented

Was it within the constitutional power of the Rent Control Board of Cambridge to deny Fresh Pond Shopping Center, Inc. a permit to demolish a rent controlled apartment building on property owned by it in order to change the use of the property from housing to department store parking?

II

Parties

The Supreme Judicial Court of Massachusetts in its judgment identified Appellee as Rent Control Board of Cambridge. Previously, the action had been formally prosecuted against Acheson Callahan, Jerald Billows, Fred Cohn, Judith Fellows and Tighe McSweeney in their capacities as members of that Board. The Board's current members are Acheson Callahan, Fred Cohn, Celia Josephson and Sally Ackerman.

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1982

No. 82-2151

**FRESH POND SHOPPING CENTER, INC.,
APPELLANT,**

v.

**RENT CONTROL BOARD OF CAMBRIDGE,
APPELLEE.**

**On Appeal from the
Supreme Judicial Court
of Massachusetts**

MOTION TO DISMISS

Appellee Rent Control Board of Cambridge hereby moves, pursuant to Supreme Court Rule 16, that the appeal filed herein by Appellant Fresh Pond Shopping Center, Inc., from the judgment of the Supreme Judicial Court of Massachusetts, be dismissed for want of a substantial federal question.

Statement of the Case

On October 22, 1979 Appellant Fresh Pond Shopping Center, Inc. ("Fresh Pond") applied to Appellee Rent Control Board of Cambridge ("the Board") for a "removal permit." Fresh Pond owned a six-unit rent controlled apartment building located at 49 Roseland Street, Cambridge. Under Ordinance 926 of the City of Cambridge, a removal permit was required before Fresh Pond could remove the building from rental housing use, demolish it, and use the site as a parking lot for a nearby department store.

On March 26, 1980, after a hearing, the Board denied the permit. It found that demolition of the building and use of the site for parking would "aggravate the shortage of decent rental housing accommodations" in Cambridge, in response to which shortage Ordinance 926 had been enacted, and found no countervailing factors to support issuance of the permit.

Ordinance 926 was enacted in 1979 by the City Council of Cambridge to control conversion of the city's rent controlled housing to other uses. It was adopted, and remains in effect, as an emergency measure, based upon the specific City Council findings that

A serious public emergency continues to exist in . . . Cambridge with respect to the housing of a substantial number of its citizens. . . . The emergency has worsened since 1976 because of the removal of a substantial number of rental housing units from the market. . . . [O]ver 10 percent of the controlled rental units. . . have been removed from the housing market since 1970, and the vacancy rate has fallen below one percent.

Ordinance 926, Section (1)(a) (Declaration of emergency).

Ordinance 926 therefore sought to conserve the remaining rent controlled housing stock in Cambridge by requiring that permits be obtained from the Board before such property was removed from rental housing use and converted to any other use.

On April 25, 1980, Fresh Pond appealed the Board's administrative decision to the Cambridge District Court, alleging that the permit denial was "arbitrary, invalid, and unconstitutional." Fresh Pond prevailed in that court, but on appeal the Massachusetts Superior Court granted summary judgment in favor of the Board. The Superior Court rejected Fresh Pond's state law arguments: that Ordinance 926 was inconsistent with Chapter 36 of the Massachusetts Acts of 1976, the Rent Control Enabling Act under which Cambridge maintained a rent and eviction control system; and that Ordinance 926 delegated excessive discretion to the Board. The Court further found that the Board's decision was supported by substantial evidence in the administrative record, and finally it held that the ordinance as applied to Fresh Pond by the Board was constitutional. On appeal, an equally-divided Supreme Judicial Court of Massachusetts affirmed the Superior Court decision in favor of the Board in all respects on March 3, 1983 without issuing an opinion. After that Court denied rehearing on March 30, 1983, this appeal followed.

ARGUMENT

I. ORDINANCE 926 IS A CONSTITUTIONAL RESTRICTION ON FRESH POND'S USE OF ITS REAL PROPERTY.

As applied to Fresh Pond, Ordinance 926 is nothing more than a local regulation of the uses to which a property owner may put his property.¹

A long line of cases in this Court upholds the power of local government thus to regulate land use. From early cases such as *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), through *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), to cases such as *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), and *Agins v. City of Tiburon*, 447 U.S. 255 (1980), this Court has made clear beyond any possible argument that, so long as the regulation "substantially advance[s] legitimate state interests," without denying the landowner "economically viable use of his land," *Agins v. City of Tiburon, supra* at 260, it will not be found to be an unconstitutional taking for which compensation is required. Indeed, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S.Ct. 3164 (1982), while finding a New York statute unconstitutional because it authorized a "permanent physical occupation" of property, this Court was careful to note that

¹ The only action Fresh Pond challenges is the denial by the Board of its application for a permit to allow it to remove its property from the rental housing stock, demolish it, and use the site for a commercial parking lot. Fresh Pond does not and cannot base this litigation on any hypothetical refusals to grant permits for other purposes, such as renovation, construction of a larger apartment building, or conversion to condominiums. See, e.g., *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982).

Those aspects of Ordinance 926 which regulate condominium conversion were upheld against constitutional challenge in *Flynn v. City of Cambridge*, 1981 Mass. Adv. Sh. 692, 418 N.E.2d 335 (1981).

We do not...question the...authority upholding a State's broad power to impose appropriate restrictions upon an owner's *use* of his property.

102 S.Ct. at 3179. (Emphasis in original.) The scope of permitted use regulation is emphasized by *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958), cited with approval by the *Loretto* Court, 102 S.Ct. at 3174, in which this Court upheld against a "taking" challenge an order that a mine entirely cease operations.

On the record in this case, there is no substantial question concerning the constitutionality of Ordinance 926. The ordinance was enacted in response to an emergency created by the shortage of rental housing in Cambridge, and seeks to preserve such housing, during the pendency of that emergency, by requiring that a landlord obtain a permit from the Board before removing his property from use as rental housing and putting it to any other use. It cannot seriously be argued that preservation of housing stock in a time of shortage is not a legitimate state interest, and indeed Fresh Pond does not so argue. Nor has Fresh Pond argued that the refusal to allow the change of use of its property to parking has deprived it of any economically viable use of the property; it implicitly concedes as it must that the property viably may be used for housing.² Finally, Fresh Pond has not argued, and could not argue, that there is a violation of the Equal Protection Clause because Ordinance 926 applies only to property now used for rent controlled housing, and not to other property in Cambridge. In view of the shortage of rental housing, Cambridge reasonably could conclude that such property required special regulation.

It is of no federal constitutional significance that the use

² The Board is required by Massachusetts law to permit landlords to charge rents for rent controlled housing sufficient to assure a "fair net operating income." Chapter 36, Section 7(a). Should such a nonconfiscatory return not be possible for the property as rental housing, the Board would be required to grant a removal permit to allow a change of use of the property.

regulation is administered by the Board in conjunction with a rent control system, rather than as zoning. See *Hadacheck v. Sebastian*, *supra* (ordinance prohibiting brickmaking); *Goldblatt v. Town of Hempstead*, *supra* (ordinance regulating dredging). Under Massachusetts law, land use may be regulated outside the zoning system, see *Lovequist v. Conservation Commission of Dennis*, 379 Mass. 7, 12, 393 N.E.2d 858, 862 (1979), and the Supreme Judicial Court of Massachusetts already explicitly has characterized Ordinance 926 as imposing "use restrictions" on property. *Flynn v. City of Cambridge*, 1981 Mass. Adv. Sh. 692, 700, 418 N.E.2d 335, 340 (1981). The restriction imposed by Ordinance 926 therefore raises no greater constitutional issue than would a zoning change in Cambridge which limited Fresh Pond's property to housing use, and forbade its use for purposes such as commercial parking. Indeed, in the *Flynn* case the Supreme Judicial Court upheld Ordinance 926 against a "taking" challenge, finding that the restrictions imposed served "a legitimate public purpose" and that property owners were guaranteed "a fair net operating income" on property used as housing. *Id.* at 701, 418 N.E.2d at 340.

Accordingly, the constitutionality of Ordinance 926 as applied to Fresh Pond follows directly from established, controlling precedents of this Court, and this appeal should be dismissed for want of a substantial federal question.

II. ORDINANCE 926 DOES NOT AUTHORIZE ANY UNCONSTITUTIONAL "PERMANENT PHYSICAL OCCUPATION" OF FRESH POND'S PROPERTY.

Perhaps recognizing the fundamental weakness of its position, Fresh Pond in its Jurisdictional Statement struggles to recast the case into the mold of *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S.Ct. 3164 (1982). In *Loretto*, this Court restated the well-established rule that a "permanent physical occupation of an owner's property authorized by government

constitutes a 'taking.' " 102 S.Ct. at 3168. Applying the rule, it found a statute authorizing cable television companies permanently to install their equipment on the property of others to be unconstitutional.

Fresh Pond argues that, as a byproduct of the Board's denial to it of a removal permit under Ordinance 926, it is unable under other applicable Massachusetts law (Chapter 36 of the Massachusetts Acts of 1976, which establishes the Cambridge rent control system) to evict a tenant residing in an apartment in its building.³ It asserts that that results in a "permanent physical occupation" of its property by the tenant, similar to the permanent physical occupation of Loretto's property by Teleprompter's cable television equipment.

Fresh Pond's argument fails to raise a substantial federal question.

*A. The Restrictions on Eviction of Fresh Pond's Tenant
Are Imposed by Chapter 36, Which Fresh Pond Did
Not Challenge Below.*

Fresh Pond's attempt to force this case within the framework of *Loretto*—its argument that the restraint on its current ability to evict its tenant constitutes a "permanent physical occupation" of its property by that tenant authorized by government, and therefore a taking—does not present a challenge to Ordinance 926 at all.

Ordinance 926 deals only with removal of rental housing units (vacant or occupied) from the rental housing market; it does not restrict tenant evictions in any way. The only restric-

³ Fresh Pond secured the voluntary departure of the tenants in all but one of its building's units after the passage of Ordinance 926 but before commencing this litigation, apparently in anticipation of obtaining a removal permit. Those units remain vacant, but Ordinance 926 does not require that a property owner offer vacant units for rent against his will. Thus, contrary to the intimations in Fresh Pond's Jurisdictional Statement, those units are not "dedicated," even temporarily, to rental housing.

tions on eviction now in effect in Cambridge originated with Chapter 842 of the Massachusetts Acts of 1970, which authorized Cambridge to institute rent control. They now are embedded in Chapter 36 of the Massachusetts Acts of 1976, which extended that authority. Absent those eviction restrictions, Fresh Pond would be completely free to evict its tenant at any time despite the Board's refusal to grant a removal permit under Ordinance 926.

Thus, if any constitutional issue is raised by the fact that Massachusetts law places restrictions on the ability of Fresh Pond freely to evict its current tenant, it is with respect to Chapter 36. But this litigation was commenced and prosecuted throughout as a challenge to the validity of Ordinance 926, not as a challenge to Chapter 36. *See, e.g.*, Superior Court "Memorandum and Order on Cross-Motions for Summary Judgment," reproduced at Jurisdictional Statement, pp. 11-12 ("Plaintiff argues that the ordinance, as applied to its case, is unconstitutional for several reasons"). Perhaps recognizing these facts, Fresh Pond attempts now to argue to this Court, in effect, that it is the combination of Ordinance 926 and the hitherto-unchallenged Chapter 36 that takes its property. But Fresh Pond cannot be allowed to shift the fundamental target of its litigation from one statute to another in an appeal to this Court. This Court will not and should not pass upon issues not properly raised below.

B. *There is No "Permanent Physical Occupation" of Fresh Pond's Property.*

Even if Fresh Pond's challenge to Chapter 36, as applied in connection with Ordinance 926, is properly before this Court, it is not substantial.

1. *Fresh Pond may seek a permit to rehabilitate or demolish its building and use the site for housing at any time.*

The limited nature and consequences of the Board's decision denying Fresh Pond a removal permit make it abundantly clear that neither that decision nor Chapter 36 grants Fresh Pond's tenant any right of "permanent physical occupation."

Fresh Pond sought a permit only for the purpose of demolishing the apartment building on its property and using the site for parking for a department store. The Board found that this would "aggravate the shortage of decent rental housing accommodations" in Cambridge, which Ordinance 926 is designed to combat, and would not provide countervailing benefits.

There is nothing in the record before the Board or in this litigation to suggest that Fresh Pond could not obtain a removal permit if what it sought to do was consistent with the purpose of Ordinance 926 and the Board's expressed preference that Fresh Pond's property not be used for a purpose other than housing. Thus, there is no basis in the record for concluding that Fresh Pond could not get a removal permit, and evict its tenant under Section 9(a)(10) of Chapter 36, if it sought to rehabilitate its property, or even to demolish the property to construct new housing.⁴ Fresh Pond was prohibited by the Board only from occupying the property to put it to a forbidden use, namely parking. Such a limited prohibition of occupancy for an illegal use cannot be characterized as a taking of the right to occupy, much less as a grant to the tenant then in possession of any right of "permanent physical occupation."⁵ Contrary to Fresh Pond's fundamental assumption, therefore, its tenant, unlike Teleprompter in the *Loretto* case, has no right whatever permanently to occupy its property.

⁴ Section 9(a)(10) of Chapter 36 permits a landlord to evict his tenant "for any other just cause."

⁵ In *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1955), this Court upheld an order that a mine entirely cease operations. Although the order could be viewed as a prohibition on occupancy of the mine property, the case was cited with approval by the *Loretto* Court as an example of a lawful use restriction.

2. A landlord may evict his tenant and occupy his property himself as housing at any time.

Section 1(b) of Ordinance 926⁶ explicitly provides that the ordinance does not even apply if an owner of rent controlled housing himself wishes to occupy a unit of the building. Such an owner needs no removal permit from the Board, and may freely evict his tenant as a matter of right under Section 9(a)(8) of Chapter 36.⁷ In short, neither Chapter 36 nor Ordinance 926 offers any protection whatever, much less a right of "permanent physical occupation," to a tenant when the owner of the property involved himself wishes to occupy that property for the permitted purpose of housing.

The contrast with the *Loretto* case therefore is stark. Teleprompter could not be displaced from its occupation of Loretto's property even if Loretto herself wished to install cable television equipment in the same location. It had the absolute right permanently to occupy the space, and Loretto was permanently barred from occupation. But Fresh Pond's tenant would not be permitted to remain if its landlord wished to occupy the affected property for the use the Board permits for it, namely housing. It is only Fresh Pond's desire to change the use of its property that even makes it necessary for it to seek a permit, and there is thus no absolute right of "permanent physical occupation" in its tenant.

3. *Ordinance 926 is a temporary enactment.*

Unlike the statute found to constitute a taking in the *Loretto* case, Ordinance 926 by its very terms is a temporary measure. As such, it can create no rights of "permanent physical occupation."

⁶ "[T]his term 'removal from the market' [for which a permit is required] does not include occupancy of a non-condominium unit by the owner of the building in which it is located or by any member of his/her immediate family."

⁷ Section 9(a)(8) of Chapter 36 permits a landlord to evict his tenant if he "seeks to recover possession in good faith for use and occupancy of himself, or [specified family members]."

Ordinance 926 was passed after an express finding that a serious public emergency existed, and will cease to apply whenever either of two conditions is met: (1) the vacancy rate in rent controlled housing exceeds four percent (4%) (Ordinance Section 1(e)(1)); or (2) the number of (controlled *and* noncontrolled) rental units in Cambridge, excluding public housing, exceeds the number as of January 1, 1970 (Ordinance Section 1(e)(2)).

Fresh Pond argues that despite this provision Ordinance 926 should be treated as a permanent enactment. But Fresh Pond has established no factual basis whatever in the record for its argument to this Court that the two conditions specified in the ordinance cannot occur; it asks this Court simply to rule as a matter of law from the face of the ordinance that the conditions cannot be met and the ordinance therefore is permanent.

Fresh Pond cannot carry its burden of proof to establish the unconstitutionality of Ordinance 926 in this extraordinary way. Given neither evidence nor findings of fact by the courts below to the contrary, this Court can only assume that the events which will render this temporary ordinance ineffective in fact can and will occur; it cannot infer in the absence of evidence and findings that an ordinance temporary on its face in fact is a permanent enactment.

Moreover, in making its argument that Ordinance 926 is permanent on its face, Fresh Pond grossly mischaracterizes the plain text of the ordinance. Fresh Pond asserts that for Ordinance 926 to go out of effect the number of rent controlled units (not the total number of rental units) must exceed the number which existed in 1970. It then argues that since new construction is not subject to rent control, the number of rent controlled units will not increase, and the condition cannot be met. But new construction can increase the number of non-controlled units, and as indicated above contrary to Fresh Pond's assertion it is the total number of units, not merely those subject to rent control, which determines whether the ordinance is in effect.⁸

⁸ Moreover, new construction also will affect the rent controlled housing vacancy rate. Fresh Pond has not, and cannot, establish by argument, absent

C. Fresh Pond Never Had the Absolute Right to Occupy Its Property For Any Purpose.

Fundamental to Fresh Pond's argument that the denial of its application for a removal permit constituted the unconstitutional authorization of a "permanent physical occupation" of its property by its tenant, is the assumption that Fresh Pond at some time before the permit denial had an absolute right to occupy the property, for whatever purpose it wished, which the Board by its action transferred to the tenant. In fact, Fresh Pond never had such a right.

When Fresh Pond obtained title to its property, Chapter 36 and Ordinance 926 both were in effect, the property had been subject to rent and eviction control since 1970, and there was a tenant in possession as a result of the voluntary letting of the property by Fresh Pond's predecessor-in-title. Hence, the package of rights Fresh Pond purchased did not include the right immediately to occupy the property; Fresh Pond purchased the property subject to the right of the current tenant to continue in possession upon payment of rent. Fresh Pond therefore cannot complain that the Board's action has taken from it any right to occupy property.

D. This Court's Decision In The Loretto Case Did Not Change The Established Principles Of Law Under Which Cambridge Is Regulating The Landlord-Tenant Relationship.

Even aside from the above considerations, there is a fundamental reason why Fresh Pond cannot argue plausibly that its attempted application to this action of *Loretto v. Teleprompter*

evidence, that construction of new rental housing and condominium units ameliorating the current shortage will not result in an increased vacancy rate in older rent controlled buildings. Indeed, to the extent that any inference could be drawn in the absence of evidence, it could only be that the vacancy rate will increase as new construction takes place.

ter Manhattan CATV Corp., 102 S.Ct. 3164 (1982), creates any substantial federal question.

When this Court decided the *Loretto* case in 1982, it was well aware that its holding might be used as the basis for challenges to long-established principles of landlord-tenant law. It therefore explicitly sought to prevent such challenges by cautioning that it was not changing that settled body of law in any way:

[W]e do not agree with appellees that application of the physical occupation rule will have dire consequences for the government's power to adjust landlord-tenant relationships. This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails. See, e.g., . . . *Bowles v. Willingham*, 321 U.S. 503 (1944) (rent control); *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (mortgage moratorium); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922) (emergency housing law); *Block v. Hirsh*, 256 U.S. 135 (1921) (rent control).

102 S.Ct. at 3178. Thus by its very terms the *Loretto* decision is no basis for any challenge to Cambridge's regulation of rental housing.

The reasons are clear. The origin of the constitutional problem in the *Loretto* case was that the statute therein authorized a third party with whom the property owner had no prior relationship to occupy his property without consent. This government-authorized nonconsensual intrusion, because it was permanent, amounted to a taking. But the rent control and eviction restrictions upheld by this Court in cases such as *Bowles v. Willingham*, 321 U.S. 503 (1944), *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922), and *Block v. Hirsh*,

256 U.S. 135 (1921), as well as those imposed by Cambridge, applied only to tenants with respect to whom the property owner first established a voluntary tenancy. Neither in those cases nor in Cambridge is any person authorized to enter or occupy property without prior consent. Unlike the situation in the *Loretto* case, any tenancies continued under rent control are with tenants freely chosen by the landowner, and the landowner may, within the boundaries of the law, establish the terms of the tenancy by contract, or decline entirely, as Fresh Pond indeed has done with its vacant units, to accept any tenants at all. Thus, no nonconsensual "permanent physical occupation" of property is authorized.

In making explicit that it was not interfering with the states' "broad power to regulate . . . the landlord-tenant relationship," 102 S.Ct at 3178, the *Loretto* Court was reflecting the fact that in Anglo-American law that relationship always has encompassed a complex set of mutual obligations and been subject to special rules. Thus, in *Block v. Hirsh, supra*, the first of the many cases in which this Court upheld restrictions on eviction in the context of rent control, Justice Holmes wrote:

The preference given to the tenant in possession is an almost necessary incident of the policy, and is traditional in English law. If the tenant remained subject to the landlord's power to evict, the attempt to limit the landlord's demands would fail.

256 U.S. at 157-158. Since the *Block v. Hirsh* decision, this Court repeatedly has upheld such eviction restrictions against constitutional challenge, and those cases are cited with approval in the *Loretto* decision together with *Block v. Hirsh*; there thus is no basis for Fresh Pond's argument that the *Loretto* decision supports its claim that its property has been taken by Cambridge's regulation of the landlord-tenant relationship.⁹

⁹ The only other case upon which Fresh Pond relies, *Rivera v. R. Cobian Chinea & Co.*, 181 F.2d 974 (1st Cir. 1950) (2-1 decision), is equally unhelpful to it. To the extent that it is not simply a thirty-year-old mis-

E. Even Were There a "Permanent Physical Occupation" of Fresh Pond's Property, It Would Be Constitutional Because the Rent Control Statute Guarantees Just Compensation to Fresh Pond in Any Event.

The emptiness of Fresh Pond's argument that its property has been taken unconstitutionally is demonstrated by the fact that the very statute which it challenges provides the compensation to which it would be entitled were there a taking of its property. In *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), this Court upheld a statute extending the period for redemption of real property sold after mortgage foreclosure; during the extended period the purchaser was prohibited from ousting the former owner and obtaining possession. This Court found the restriction constitutional, noting *inter alia* that

reading by a divided Court of Appeals of the long line of cases in this Court upholding rent and eviction controls, the *Rivera* decision is inapplicable to this case.

In *Rivera*, the Court of Appeals found that a prohibition of eviction, where the owner wished to occupy the rental property himself to use it as the tenant had been using it, was unconstitutional. But Ordinance 926 would not require Fresh Pond to obtain a removal permit if it wished simply to evict its tenant and occupy its property without changing the use of the property. Thus, Ordinance 926 would not even apply to the situation before the *Rivera* court.

Moreover, the *Rivera* holding was based expressly on a finding that the eviction restriction in the Puerto Rican statute had no reasonable relation to the statute's purpose; it was not the purpose of the Puerto Rican act, as it is of Ordinance 926, to prevent any worsening of the shortage of housing or to protect tenants in their occupancy. The court in *Rivera* expressly did not hold unconstitutional an eviction restriction in a situation, such as the one herein, where those were the purposes of the statute.

Thus, the paragraph from the *Rivera* decision quoted at length by Fresh Pond in its Jurisdictional Statement, to the effect that compelling the plaintiff to keep his property in the rental market and preventing him from using it himself "would appear to be a 'taking' of the property for which just compensation has not been provided," 181 F.2d at 978, is dictum, in addition to being inapplicable to the facts of this case and incorrect in view of this Court's consistent upholding of eviction controls in the rent control context.

While the mortgagor remains in possession, he must pay the rental value as that value has been determined, upon notice and hearing, by the court. . . . While the mortgagee-purchaser is debarred from actual possession, he has, so far as rental value is concerned, the equivalent of possession during the extended period.

Id. at 425.

Here too, to the extent that Chapter 36 (not Ordinance 926) debars Fresh Pond from possession of any unit, Fresh Pond is entitled under that very statute to a nonconfiscatory "fair net operating income" as rental for the unit. Hence, unlike the property owner in *Loretto*, who was given a one-time \$1 payment, Fresh Pond is provided with exactly the payment to which it would be entitled if the Board indeed did "take" the unit for occupation by a tenant during the pendency of the housing emergency. Even if Chapter 36 constituted a taking, it therefore provides within it the very compensation to which Fresh Pond would be entitled, and hence is constitutional.¹⁰

Conclusion

The appeal should be dismissed for want of a substantial federal question.

Respectfully submitted,

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¹⁰ The Board would be required to permit Fresh Pond to remove its property from rental housing use if Fresh Pond were unable to obtain a constitutionally-adequate (i.e., nonconfiscatory) return on the property as rental housing. Fresh Pond has not alleged this to be the case. See note 2, *supra*.